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The Need for Federal Disclosure and Fraud Protection in the Workplace

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THE NEED FOR FEDERAL DISCLOSURE
AND FRAUD PROTECTION
IN THE WORKPLACE

CARLOS GARCIA*

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INTRODUCTION

In the capital market, investors who engage in the purchase of securities receive a plethora of protection, which better assists them in making sound investment decisions, both in the short-term and long-term future. Indeed, protection is abundant in the capital market, spanning from state legislation to comprehensive federal legislation, providing federal statutory affirmative duty requirements by companies to fully and fairly disclose financial information including but not limited to profitability conditions and health. Capital investors also have the available benefit of instituting federal claims against issuers of stock for fraudulent misrepresentations contrary to federal securities laws. These protections exist in many other regulatory sectors, such as campaign finance,¹ product safety,² energy regulation,³ environmental law,⁴ and health law.⁵

However, in the employment and labor market,⁶ affirmative information disclosure obligations and fraud protection (i.e. the availability of a cause of action for fraudulent misrepresentations) are

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¹ See Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-56 (2012).

² See Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2055 (2012); *see also* Publicly Available Consumer Product Safety Information Database, U.S. CONSUMER PRODUCT SAFETY COMMISSION, <http://www.saferproducts.gov> (last visited Mar. 20, 2014) (providing a publicly searchable database where people can file reports including harms or risks of harm related to the use of consumer products or substances).

³ See Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. §§ 259.1-259.2 (2014) (mandating disclosure of estimated city and highway miles per gallon for automobiles); *id.* § 305.11 (mandating disclosure of energy consumption and water usage for appliances); *see also* About Energy Star, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.energystar.gov/about/> (last visited Mar. 20, 2014) (describing a joint program with the Environmental Protection Agency concerning labeling and environmental standards for products and buildings).

⁴ See Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11021-11023 (2012) (requiring disclosure of toxic and hazardous chemicals to communities and neighborhoods); *see also* Standard for Demolition and Renovation, 40 C.F.R. § 61.145 (2013) (mandating disclosure of asbestos-releasing demolition and renovation activities); *id.* § 156.10 (mandating disclosure of pesticide ingredients).

⁵ See Nutrition Labeling of Food, 21 C.F.R. § 101.9 (2014) (mandating disclosure of nutritional information for food products); *id.* § 1141.1 (requiring health warnings displays on cigarette packages and cigarette advertisements).

⁶ Although labor law governs labor-management relations primarily in unionized workplaces, while employment law regulates non-unionized workplaces, this paper encompasses employees in both the labor and employment market; thus, for clarification purposes, this paper uses the term “employment and labor market.” Also, this term is used interchangeably with “workplace” throughout, and “employment and labor law” is used interchangeably with “workplace law.”

not yet available on a national level. Many justifications have been put forth for the absence of such obligations and protections for employees in the employment and labor market. For instance, much research exists on the economic costs of mandating federal regulation and many argue that current common law and state statutory remedies are adequate. Notwithstanding the various arguments in opposition to instituting federal disclosure and fraud protection in the workplace, this paper investigates and argues that both forms of regulation are necessary.

Requiring employers to disclose pertinent information is vital to the wellbeing of their employees, and the necessity of holding employers liable for misrepresentations must exist in conjunction. There are many instances of employers misleading their employees, either because they failed to disclose material facts to their detriment or because employers made affirmatively fraudulent misrepresentations. For reasons set forth below, employees have a difficult time succeeding in lawsuits against their employers.

Take for instance employers falsely inducing their employees to believe their jobs are safer than they actually are. This is an all too common occurrence. A vivid example is the case of *Local 1330, United Steel Workers v. United States Steel Corp.*, involving the closure of two American steel plants in Youngstown, Ohio in the 1970s and 1980s.⁷ The holding in the case is rather simple: management retains management control of the company; a union has its role limited to negotiating the terms and conditions of employment; and the decision on how to run a company, including closing business due to profitability issues, is reserved to management.⁸ The devastating consequences were not that simple, however.

U.S. Steel Corp. was at an all-time low, facing economic struggle to stay afloat, while having to tackle with competition and outdated facilities and machinery.⁹ During this time, U.S. Steel Corp.'s two Youngstown plants had employed 3,500 employees.¹⁰

After hearing rumors that the two steel plants would be closing, employees asked management about the future of the plants, including whether it was making enough profit and planned to stay operating in the long haul.¹¹ Naturally, Youngstown steel plant employees were

⁷ *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1264 (6th Cir. 1980).

⁸ *Id.* at 1282.

⁹ *Id.* at 1265-66.

¹⁰ *Id.* at 1272.

¹¹ *Id.* at 1270.

concerned about the security of their jobs. In response, “hotline” telephones were “placed strategically in these plants so that employees could hear prerecorded management policy statements.”¹²

Representations by management began with statements made by then president of U.S. Steel Corp. David Roderick: “[i]n response to many rumors, I want to tell you that there are no immediate plans to permanently shut down either the Ohio Works or McDonald Mills,” “[t]he continued operation of these plants is absolutely dependent upon their being profit-makers, and “[i]n the months ahead, we will be calling for the full support of each and every one of you” because “[y]our cooperation and assistance is absolutely necessary if our facilities are to continue to operate.”¹³ Company press releases depicted productivity improvements in the two Youngstown steel plants, some of them including references to a “complete turnaround” and the plants being once again “profitable.”¹⁴

Management made it a point to reiterate that U.S. Steel Corp.’s future was in the hands of its employees, challenging them to continue to be innovative and to produce quality products for the company’s customers.¹⁵ After making a monthly profit for the year, management stated, again through the company’s hotline, that the company’s goals were indeed attainable.¹⁶ Management was so confident about this that they continued to make press releases, stating, *inter alia*, “[w]e’ll be doing business here for some time to come.”¹⁷ Management told its employees it had attained its 1978 goal of “survival” and it was now time to transition into the goal of “revival.”¹⁸ Also, in early November, another corporate official made similar assertions when he stated that “[w]e’ve said all along the Ohio Works has been profitable and there are no plans for a shutdown.”¹⁹

As a result of U.S. Steel Corp.’s representations, many employees forewent opportunities, for instance, to take other employment job offers, and they committed themselves to long-term expenses including the purchase of homes.²⁰ One employee, considering whether to take employment elsewhere as his pension was close to vesting, was advised by his foreman to stay with U.S. Steel Corp. because he would have a

¹² *Id.* at 1270 n.3.

¹³ *Id.* at 1270.

¹⁴ *Id.*

¹⁵ *Id.* at 1271.

¹⁶ *Id.* at 1272.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1273.

²⁰ *Id.* at 1276.

“secure future” there.²¹ Upon this reliance, the employee stayed with the company, purchased a car soon after, and then purchased a home some months later.²²

However, the reality was that both Youngstown steel plants would soon be closing—and they did. On November 27, 1979 (approximately six to nine months later), the decision was made by the Board of Directors to shut down, the same day an employee had purchased a home and heard the news on his car radio on his way back from the bank.²³ With their livelihoods and families now at stake, 3,500 employees would soon be out of work.²⁴

It is difficult to know for certain whether the corporate board really knew whether U.S. Steel Corp., along with its two Youngstown plants, would soon go out of business. Nevertheless, whether corporate representatives knew does not negate the recurring statements made, including one of the last announcements by Mr. Roderick: “[s]imply stated, we have no plans for shutting down our Youngstown operation,”²⁵ reiterating that only “massive expenditures to meet environmental requirements” could cause a plant closing, or, an “unproductive plant operation.”²⁶ Even though employee plaintiffs could not prove it, it is quite possible that U.S. Steel Corp. made misrepresentations by giving incomplete or false information.

The laid off employees of the Youngstown plants sought remedies, making various arguments against U.S. Steel Corp. Their first claim sought an equitable contract remedy of promissory estoppel, attempting to estop U.S. Steel Corp. from denying there was an enforceable promise when it made the representations to its employees, which they ultimately relied upon to their detriment.²⁷ The Sixth Circuit agreed that U.S. Steel Corp. engaged in a “major campaign to enlist employee participation in an all-out effort to make these two plants profitable in order to prevent their being closed” and that it was “equally obvious that the employees responded wholeheartedly.”²⁸

²¹ *Id.*

²² *Id.* at 1276-77.

²³ *Id.* at 1277.

²⁴ *Id.* at 1265.

²⁵ *Id.* at 1273.

²⁶ *Id.*

²⁷ *Id.* at 1270. The doctrine of promissory estoppel recognizes the possibility of the formation of a contract by action or forbearance by the induced party, based upon a promise made by the inducing party under circumstances where the actions or forbearance of the induced party should have been reasonably expected to produce the detrimental results of the induced party which it produced. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1932).

²⁸ *Local 1330*, 631 F.2d at 1277.

Nevertheless, the Sixth Circuit agreed with the trial court's reasoning that none of the statements made by plant officers constituted a definite promise to continue operations of the plants if they did become profitable, and that, *inter alia*, the "condition precedent of the alleged contract and promise—profitability of the Youngstown facilities—was never fulfilled."²⁹ Employee plaintiffs next asserted a community property claim, that based on reliance interests, property rights had arisen from the "long-established relation between the community of the 19th Congressional District and Plaintiffs," which required U.S. Steel Corp. to assist in the preservation of the institution of steel in Youngstown by making a cost determination of rehabilitating the community and workers, and ultimately restraining from leaving the community in a state of waste.³⁰ Unfortunately, as the trial court would hold, there was no legal precedent for such a claim.

The Sixth Circuit ultimately affirmed the trial court's decisions, adding that the "formulation of public policy on the great issues involved in plant closings and removals is clearly the responsibility of the legislatures of the states or of the Congress of the United States."³¹ After U.S. Steel Corp. pulled out of Youngstown, the consequences were devastating: the city lost approximately one third of its population and it continues to have one of the highest unemployment rates in the state.

Local 1330 is just one example of recurring and debilitating effects of nondisclosure and employer fraud in the workplace.³² Is it in fact feasible to require employers to disclose information, while at the same time holding them liable for providing inaccurate or fraudulent disclosures? More specifically, should there be federal legislation that encompasses an affirmative information disclosure requirement and a cause of action

²⁹ *Id.* at 1277. Much of the debate in this claim rested on what constituted "profitability." In the end, the Sixth Circuit failed to adopt plaintiff employees' definition of "profitability," and using instead U.S. Steel Corp.'s definition, held there was actually non-profitability." *Id.* at 1279.

³⁰ *Id.* at 1280.

³¹ *Id.* at 1282.

³² Another example is *Washington v. Aircap Industries, Inc.*, 860 F. Supp. 307, 310-11 (D.S.C. 1994), where the company made the official decision to close its factory in May, but even after such decision was made, told its workers that the plant would remain open and continue operating through the summer of the same year. The plant closed only six weeks after the decision to close was made. *Id.* at 310-11. *See also* *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1405 (9th Cir. 1991), in which Sun Carriers bought Milne, an independent trucking company, and allegedly made speeches to Milne employees, showing them videos and promising job security, as well as asking them to stop looking for employment elsewhere. Several months later, Sun Carriers chose to close all Milne plants. *Id.* at 1405. Additionally, in *Charter Township of Ypsilanti v. General Motors Corp.*, 506 N.W.2d 556, 558-59 (Mich. Ct. App. 1993) (*per curiam*), the city of Ypsilanti sued General Motors after the company made the decision to close a plant there. Based on implicit and explicit representations, Ypsilanti granted General Motors an array of tax abatements that would enable the company to "continue production and maintain continuous employment for [their] employees." *Id.* at 561.

for employees in order to remedy wrongful misrepresentations by their employers? This paper argues that it would be feasible. A uniform obligation to disclose accurate information can play a pivotal role in insuring that both current employees and prospective employees have the information they need to make sound decisions about their short-term and long-term wellbeing.

This paper uses federal securities laws to illustrate the comprehensiveness of federal disclosure requirements and fraud protection available to capital investors. It is important to note that corporate law and employment (or labor) law have rarely been studied together and it has been observed that the two fields are separate fields of legal scholarship and regulatory policy.³³ Nevertheless, this does not mean that corporate lawyers do not delve into employment and labor law or vice versa, nor does it signify a lack of relevance to one another.³⁴ For example, corporate law, which provides the legal structure and regulation over business entities, allows such entities to enter employment agreements with employees.³⁵ Simultaneously, a corporation's actions in "establishing, conducting, and terminating" employment relationships are subject to employment and labor law.³⁶

Part I of this paper starts with an explanation of the origins and common law background of the law of fraud (or deceit) and nondisclosure. Part II then proceeds to argue that federal disclosure and fraud protection are not mutually exclusive forms of regulation and must be used in conjunction with one another. Part III examines the status quo in the capital market and in the employment and labor market with regard to disclosure requirements and federal fraud protection, including concerns Congress had when enacting federal legislation. Part IV attempts to reconcile congressional concerns in the capital and employment and labor market and argues that a disclosure mandate supplemented by fraud protection is also justified in the workplace. Part V proceeds to discuss the general importance of federal information disclosure and fraud protection. Part VI argues that the status quo in the employment and labor market is insufficient and supports this proposition by examining voluntary forms of disclosure, the possibility of market-self correction, state common and statutory law, and the individual employment rights law model. Part VII

³³ Steven Anderman, *Termination of Employment: Whose Property Rights?*, in *THE FUTURE OF LABOUR LAW* 126 (Catherine Barnard et al. eds., 2004); Simon Deakin, *Workers, Finance and Democracy*, in *THE FUTURE OF LABOUR LAW* 79 (Catherine Barnard et al. eds., 2004).

³⁴ Richard Mitchell et al., *Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labor Law*, 23 *WIS. INT'L L.J.* 417, 417 (2005).

³⁵ *Id.* at 417.

³⁶ *Id.* at 417.

analyzes some of the costs and benefits of a federal statutory response to disclosure and fraud protection in the employment and labor market. Part VIII outlines a recommended federal statute of disclosure and fraud protection by addressing its possible contours and scope, methods to reduce costs and anticipate unintended consequences, the possibility of an executive administrative agency to promulgate rules to aid in further interpreting the proposed federal statute, as well as possible liabilities and enforcement schemes that could be used. Part IX concludes with the proposition that a federal law is both possible and necessary.

I. ORIGIN AND COMMON LAW BACKGROUND OF FRAUD AND DISCLOSURE REQUIREMENTS

The law of torts pertaining to fraud (also known as the law of deceit), dates back to 1201.³⁷ To be liable for fraudulent misrepresentation at common law, one must make a misrepresentation of fact, opinion, intention, or law with the purpose of persuading another to take action or to *omit* from taking an action in reliance upon the misrepresentation.³⁸ If this occurs, the deceiver is liable to the other for his or her economic loss incurred.³⁹ A misrepresentation in this context denotes words and/or conduct that lead to an assertion that is not the truth.⁴⁰ Furthermore, to be fraudulent, the misrepresentation must have some degree of scienter; specifically, the speaker must “know[] or believe[] that the matter is not as he represents it to be; does not have the confidence in the accuracy of his representation that he states or implies, or knows that he does not have the basis for his representation that he states or implies.”⁴¹

Common law fraud protects against statements made about the future that is in the form of a prediction or promise where it may justifiably imply that the person making the representation “knows of nothing which will make the fulfillment of his prediction or promise impossible or improbable.”⁴² Hence, an assertion that a used Macintosh Apple MacBook Pro 15 inch laptop computer will have a battery life of five hours when not plugged in is an implied assertion that the condition of the computer will enable it to do so. In this case,

³⁷ W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 105, 727 n. 30 (5th ed. 1984).

³⁸ RESTATEMENT (SECOND) OF TORTS § 525 (1977).

³⁹ *Id.*

⁴⁰ *Id.* at § 525 cmt. b.

⁴¹ *Id.* at § 526. Thus, a seller believing his car to have engine problems, and who, upon inquiry by the purchaser, states that the car does not have engine problems and that it runs well, is liable for the deceit.

⁴² *Id.* at § 525 cmt. f.

the misrepresentation will be actionable if the speaker of the assertion knows that the Mac computer has only ever run on two hours of battery life when not plugged in.

A person can also be liable for silence or nondisclosure of facts.⁴³ For instance, in a business transaction a party can be under a duty to exercise reasonable care by disclosing certain facts to the other party before the transaction is completed.⁴⁴ This includes information that the other party is entitled to know because of a fiduciary relationship of trust and confidence between the one with the information and the other who needs it.⁴⁵ This is because a person of trust has “an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients.”⁴⁶

Liability for nondisclosure also includes partial or incomplete statements, because they are misleading or ambiguous as to lead to two interpretations, one true and one false.⁴⁷ In this circumstance, it would be necessary to avoid misleading the recipient of the information. Another requirement of disclosure occurs when the person has “facts basic to the transaction.”⁴⁸ A “basic” fact means “a fact that is assumed by the parties as a basis for the transaction itself” which “goes to the . . . essence of the transaction, and is an important part of the substance of what is bargained for.”⁴⁹ For instance, A sells an automobile to B, without disclosing to B that the engine of the automobile is close to malfunctioning. This would be a basic fact that goes to the essence of the transaction between A and B and therefore A would have a duty to disclose.

Additionally, one who conceals information may be liable in a transaction with another party who “intentionally prevents the other from acquiring material information.”⁵⁰ For instance, in order to conceal the fact that A’s horse, which he is trying to sell to B, is a crib-biter and wind-sucker, A hitches the horse up with its head raised so

⁴³ *Id.* at § 551 (1977).

⁴⁴ *Id.* at § 551(2).

⁴⁵ *Id.* at § 551(2)(a).

⁴⁶ *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). The duty to exercise reasonable care and disclose can also be seen in other contexts, such as relations between estate executor and beneficiary, *Foreman v. Henry*, 210 P. 1026, 1026-27 (Okla. 1922); principal and agent, *McDonough v. Williams*, 92 S.W. 783, 788 (Ark. 1905); bank and investing depositor, *Brasher v. First Nat. Bank*, 168 So. 42 (Ala. 1936); Tcherepnin v. Franz, 393 F. Supp. 1197 (N.D. Ill. 1975); and majority and minority stockholders, *Speed v. Transamerica Corp.*, 99 F. Supp. 808 (D. Del. 1951).

⁴⁷ *RESTATEMENT (SECOND) OF TORTS* § 551(2)(b).

⁴⁸ *Id.* at § 551(2)(e).

⁴⁹ *Id.* at § 551(2)(e) cmt. j.

⁵⁰ *Id.* at § 550.

that it cannot bite its crib and suck wind. B inspects the horse and does not discover the defects. Here, A would be liable to B for the intentional nondisclosure.⁵¹ Moreover, there is no duty to disclose *all* information in an arm's length relationship, but "a duty to speak may arise from partial disclosure, so that the speaker, although not under a duty to speak, has a duty to tell the whole truth if he does speak."⁵² There is no requirement of contractual privity in the affirmative misrepresentation case at common law.⁵³ Thus, an actionable claim would arise for a material misrepresentation or material omission without the parties having had engaged in a formal or informal business transaction.

II. MUTUAL EXCLUSIVITY: MANDATED DISCLOSURE AND FRAUD PROTECTION

Federal disclosure and fraud protection are not mutually exclusive forms of regulation. An employer cannot be obligated to disclose information to its employees without the added necessity of disclosing *accurate* information, i.e. without holding the employer liable for providing *inaccurate* information. One can be mandated to disclose, but it will not serve a purpose to people who need the information, unless the entity disclosing provides accurate information. An incentive is needed and creating liability will accomplish this task: holding entities and individuals liable either for not disclosing when disclosure is necessary to prevent inaccuracies, or, for affirmatively disclosing inaccurate information. As one commentator put it: "mandatory public disclosure would be meaningless if employers were not accountable for false or misleading representations."⁵⁴ Thus, this paper examines both forms of regulation in conjunction with one another.

III. THE STATUS QUO

In order to understand the analytical framework of the federal legislative proposal that this paper seeks to make, it is important to explain the current state of affairs with regard to protection in the employment and labor market and the congressional concerns underpinning the enactment of various federal statutes, and compare that with the status quo in other markets, namely the capital market, which provide the type of protection that this paper proposes for the employment and labor market.

⁵¹ *Croyle v. Moses*, 90 Pa. 250, 253-54 (1879).

⁵² W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 108 (5th ed. 1984)

⁵³ Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 729 (1997).

⁵⁴ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 400 (2011).

A. PROTECTION AND FOUNDATIONS IN THE CAPITAL MARKET

1. FEDERAL DISCLOSURE REQUIREMENTS AND FRAUD PROTECTION IN THE CAPITAL MARKET

In the capital market, there is an array of federal statutory protection, including disclosure requirements requiring companies to make continuous disclosures throughout various periods of time. The Securities Act of 1933, sometimes called the “truth in securities” law (herein “Securities Act”), was enacted with the main purpose of “provid[ing] full and fair disclosure of the character of securities sold in interstate commerce and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.”⁵⁵ The Securities Act requires that investors have available financial information concerning publicly offered securities and aims to prohibit “deceit, misrepresentations, and other fraud in the sale of securities.”⁵⁶ Specifically, companies must file an effective registration statement pursuant to section 5 of the Securities Act with the U.S. Securities and Exchange Commission.⁵⁷ The registration forms provide important facts to investors, including: a description of the company property and business; description of the respective security to be sold; information regarding management of the company; and financial statements of the company which are certified by accountants.⁵⁸ Although there are statutory and regulatory exceptions to a section 5 registration requirement,⁵⁹ such exceptions are intended for investors who are

⁵⁵ Securities Act of 1933, H.R. 5480, 73rd Cong. Preamble (1933).

⁵⁶ *The Laws That Govern the Securities Industry*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/laws.shtml#secact1933> (last visited Mar. 20, 2014).

⁵⁷ Securities Act of 1933, 15 U.S.C. § 77e.

⁵⁸ *Registration Under the Securities Act of 1933*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/answers/regist33.htm> (last visited Mar. 20, 2014).

⁵⁹ See, e.g., Securities Act of 1933, 15 U.S.C. 77d, also known as the “intrastate” exemption, which was designed for offerings by businesses incorporated and doing business in one state where securities are offered and sold to in-state residents and businesses for in-state financing needs. The reasoning behind such exemption is that state securities regulation provides sufficient protection for investors purchasing state securities on a more local scale than on a national scale. Moreover, it is worth noting that although certain statutory and regulatory exemptions free the issuing company from the Securities Act’s registration requirements, generally, the prohibitions against fraud in the offer and sale of securities still apply. See Securities Exchange Act of 1934, 15 U.S.C. § 78j (2012), “It shall be unlawful for any person, . . . by the use of any means or instrumentality . . . to effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of *any security* other than a government security” (emphasis added). Another securities exemption is known as the “small or limited” exemption under section 3(b) of the Securities Act, which allows issuers to bypass section 5 registration requirements if no more than an aggregate amount issued is \$1 million in a particular sale and not for the life of the corporation. See Securities Act of 1933, 15 U.S.C. § 77d. SEC Rules 504 and 505 provide further regulatory measures for particular types of sales under section 3(b). See Exemption for Limited Offerings and Sales of Securities not Exceeding \$1,000,000, 17 C.F.R. § 230.504 (2014); Exemption for Limited Offers and Sales of Securities not Exceeding \$5,000,000, 17 C.F.R. § 230.505 (2014). The economic justification

generally able to fend for themselves without the full disclosure statements required by the Securities Act. A part of the registration statement includes a prospectus, another means for potential buyers of securities to understand the complexities and intricacies of the transaction they are likely to contract in.⁶⁰

A section 5 registration statement requirement also includes informational requirements which consist of over thirty-two items regarding the issuing corporation and its finances, and provides a foundation for civil liability for releasing false or misleading information.⁶¹

After its initial enactment, the Securities Act received fierce opposition, particularly because compliance with disclosing would be expensive, tedious, and thus cause corporations to look at raising capital through alternative sources rather than making public stock offerings.⁶² In the end, however, a federal mandatory disclosure system was enacted.⁶³

Another principal federal statute in the capital market requiring information disclosures is the Securities Exchange Act of 1934 (herein "Exchange Act").⁶⁴ A company deemed "public" for purposes of the Exchange Act⁶⁵ will be required to provide continuous disclosures: annually on Form 10-K,⁶⁶ which is an annual report required by the

behind such exemption is apparent: if fraud arises, the monetary impact will not be as great as compared to the transactional dollar amount in a national exchange market where the risk of impact may be higher. Additionally, under the "private placement" exemption, sales can only be made to sophisticated or "accredited" investors, including investors who have proper training in law or finance, experienced businessmen, accountants, and those who can fend for themselves and ask all the right questions. *See* Securities Act of 1933, 15 U.S.C. § 77d. SEC Rule 505 and 506 provides further regulations by placing a limit on the number of accredited investors. *See* 17 C.F.R. § 230.505; Exemption for Limited Offers and Sales without Regard to Dollar Amount of Offering, 17 C.F.R. § 230.506 (2014).

⁶⁰ *See* Securities Act of 1933, 15 U.S.C. § 77j, which prescribes what is required to be included in every prospectus used in securities trading.

⁶¹ Securities Act of 1933, 15 U.S.C. § 77k.

⁶² Joel Seligman, *The SEC and the Future of Finance*, 99 HARV. L. REV. 710, 710 (1986).

⁶³ *Id.*

⁶⁴ Securities Act of 1934, 15 U.S.C. § 78a et seq.

⁶⁵ "Companies with more than \$10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports." *The Laws that Govern the Securities Industry*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/laws.shtml#secexact1934> (last visited Mar. 20, 2014). A company is also deemed "public" if it has its stock listed on a national or regional securities exchange. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78l. Thus, a company with stock listed under the New York Stock Exchange (NYSE), the National Association of Securities Dealers Automated Quotations (NASDAQ), or the Chicago Stock Exchange (CHX) will be deemed "public" and it will be unlawful for the issuer to "effect any transaction in any security . . . unless a registration is effective." *Id.*

⁶⁶ Form 10-K, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/answers/form10k.htm> (last visited Mar. 20, 2014).

Securities and Exchange Commission (SEC) that gives, *inter alia*, a comprehensive overview of a company's business and financial performance; and, Form 10-Q, which must be filed for each of the first three fiscal quarters of the company's fiscal year.⁶⁷ The form "includes unaudited financial statements and provides a continuing view of the company's financial position during the year."⁶⁸

Aside from federal disclosure requirements, capital investors, if successful, can hold entities liable for fraudulent misrepresentations. For instance, the Securities Act imposes civil liability on anyone who makes or causes to be made any misrepresentations of its registration statement, including untrue statements of fact or omissions of material fact.⁶⁹

Investors also receive protection against companies who induce investors to purchase its securities with fraudulent misrepresentations, under SEC Rule 10b-5,⁷⁰ promulgated pursuant to section 10(b) of the Exchange Act.⁷¹ Indeed, it is considered the most prominent, most frequently invoked federal rule for addressing securities fraud.⁷² It can apply in a range of circumstances, namely, when a company attempts to issue securities and in the process lies to the public in a private or public sale under the Securities Act, when an insider or company engages in insider trading,⁷³ or when issuers attempt to engage in market manipulation by deliberately attempting to interfere with free economic competition.⁷⁴ Moreover, a company and its representatives can violate federal securities laws by providing "false or misleadingly

⁶⁷ Form 10-Q, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/answers/form10q.htm> (last visited Mar. 20, 2014).

⁶⁸ *Id.*

⁶⁹ Securities Act of 1933, 15 U.S.C. § 77w. *See also* Securities Act of 1933, 15 U.S.C. § 77k, which imposes penalties for anyone found liable under § 77w or any other provisions of the Securities Act. Thus, investors who purchase company securities after the company has issued its registration statement that "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading" creates a cause of action. *Id.*

⁷⁰ Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2014).

⁷¹ Securities Exchange Act of 1934, 15 U.S.C. § 78j (2012).

⁷² *See* Sec. & Exch. Comm'n v. Nat'l Sec., Inc., 393 U.S. 453, 465 (1969) (noting that section 10(b) and Rule 10b-5 "may well be the most litigated provisions in the federal securities laws").

⁷³ Although the term "insider trading" includes both legal and illegal conduct, "illegal insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security." *See Insider Trading*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/answers/insider.htm> (last visited Mar. 20, 2014).

⁷⁴ Other instances where liability under Rule 10b-5 may be created include: Ponzi schemes; theft or misappropriation of funds or securities; fraudulent or unregistered securities offerings; false or misleading statements about a company; and abusive naked short selling. *See Enforcement Tips and Complaints*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/complaint/tipscomplaint.shtml> (last visited Mar. 20, 2014).

incomplete information in some informal context such as a report, press release, or director's speech, even if the communication is voluntary."⁷⁵

2. THE FOUNDATIONS OF FEDERAL DISCLOSURE REQUIREMENTS AND FRAUD PROTECTION IN THE CAPITAL MARKET

During the 1920s and 1930s, the United States lived through one of the most severe economic crisis in its history. Business regulation and institutional measures were necessary and laissez-faire economic policies were no longer suitable.⁷⁶ Although Congress enacted a number of federal statutes to regulate securities and prevent economic disasters like the Great Depression,⁷⁷ the legislation that had the greatest impact on the capital market were the Securities Act of 1933 and the Securities Exchange Act of 1934.⁷⁸

The general purpose of the Securities Act was "to regulate the initial distribution of securities by issuers to public investors."⁷⁹ The goal of the various registration requirements was to provide full disclosure and truthful information regarding the character and condition of the securities offered to the public community.⁸⁰

It is important to note that before any federal legislation was enacted, state governments enacted their own securities legislation.⁸¹ These state laws were known as "blue sky" laws because state legislators believed that if they did not pass state securities legislation, financial

⁷⁵ Greenfield, *supra* note 53, at 727-28. For instance, in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 861-62 (2d Cir. 1968), the defendant corporation distributed a misleading press release about a huge ore strike. The Second Circuit held that Rule 10b-5 "is violated whenever assertions are made . . . in a manner reasonably calculated to influence the investing public, e.g., by means of the financial media . . . if such assertions are false or misleading or are so incomplete as to mislead irrespective of whether the issuance of the release was motivated by corporate officials for ulterior purposes." *Id.*

⁷⁶ Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 329 (1988).

⁷⁷ See, e.g., the Public Utilities Holding Company Act of 1935, which "pervasively regulates electric and gas holding companies and their subsidiaries in order to assure their compliance with the statutory standards of geographical integration and corporate simplification" (LOUIS LOSS ET AL., *FUNDAMENTALS OF SECURITIES REGULATION* 37 (1988)); the Trust Indenture Act of 1939, which requires that bonds, notes, debentures, and similar securities offered for public sale, unless exempted by the Act, be issued under the respective indenture that meets Act requirements (H. BLOOMENTHAL, *CASES AND MATERIALS ON SECURITIES LAW* 2 (1966)); the Investment Company Act of 1940, which regulated companies engaged in "investing, reinvesting, owning, holding, or trading in securities" and required their registration (H. BLOOMENTHAL, *CASES AND MATERIALS ON SECURITIES LAW* 3 (1966)); and the Investment Advisors Act of 1940, which regulates broker-dealers engaged in advising people "with respect to securities" and requires them to register with the SEC (H. BLOOMENTHAL, *CASES AND MATERIALS ON SECURITIES LAW* 3 (1966)).

⁷⁸ Keller, *supra* note 76, at 329.

⁷⁹ *Id.* at 330-332.

⁸⁰ *Id.*

⁸¹ MICHAEL E. PARRISH, *SECURITIES REGULATION AND THE NEW DEAL* 6 (1970).

pirates would sell people everything in the state *but* the blue sky.⁸² Blue sky laws were broken down into two categories: antifraud laws and licensing laws.⁸³ Antifraud laws gave statutory authority for designated officials to investigate suspected fraud, enjoin fraudulent activities, and institute criminal proceedings in some cases.⁸⁴ However, such antifraud laws took effect only after there was sufficient evidence that fraud had either been or about to be committed in securities trading.⁸⁵ Licensing laws had the purpose of prohibiting sales until proper registration filing was made, and the state granted official authority to engage in the selling of securities.⁸⁶ The kind of registration required by these blue sky laws consisted of making company disclosures of financial condition and history, which was ultimately regulated by appropriate officials of the state securities agency.⁸⁷

However, blue sky laws were ineffective for various reasons: there was a gap in the required level of expertise needed to enforce blue sky laws, as the enforcement of these laws were delegated to “unspecialized attorneys” and would change whenever political administrations would change, making blue sky enforcement unsteady;⁸⁸ state funding was insufficient to maintain the necessary manpower needed to enforce such laws through investigation and instituting both remedial and prosecutorial action;⁸⁹ many states were lenient in their enforcement of securities regulation in order to attract outside industry,⁹⁰ and, promoters and dealers being investigated and prosecuted would offer refunds to prosecution witnesses who would many times accept the offers, causing the case to fail for insufficient evidence and ultimately interfering with effective enforcement of blue sky laws.⁹¹

Additionally, circulars used prior to 1933, which were used to estimate the worth of a security proved to be ineffective, as they included “very little information as to the use of the proceeds, a rather brief description of the securities themselves, and very few if any material facts relating to the business of the issuer.”⁹² And, fraudulent

⁸² *Id.* at 5, n. 1.

⁸³ John E. Tracy, *The New Federal Securities Act*, 31 MICH. L. REV. 1117, 1118-19 (1933).

⁸⁴ *Id.* at 1119.

⁸⁵ Keller, *supra* note 76, at 331.

⁸⁶ *Id.*

⁸⁷ Tracy, *supra* note 83, at 1117-1118

⁸⁸ JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 46 (1982).

⁸⁹ *Id.*

⁹⁰ *Federal Securities Act: Hearing on H.R. 4314 Before the H. Interstate and Foreign Commerce Comm.*, 73d Cong., 99-100 (1933) (Dept. of Commerce: A Study of the Economic and Legal Aspects of the Proposed Federal Securities Act).

⁹¹ *Id.*

⁹² Halleran & Calderwood, *Effect of Federal Regulation on Distribution of and Trading in Securities*, 28

practices were rampant.⁹³ The general belief among legislators was that a great number of securities underwriters and dealers had not been operating in a fair and honest manner.⁹⁴ It soon became clear that the ineffectiveness of blue sky legislation, together with a lack of state law uniformity in dealing with securities fraud called for an increased demand for federal legislation. The time for a federal response had come.

Although it was clear that blue sky legislation had various setbacks and a federal response was necessary, the advent of federal securities law would not come until soon after the stock market crash. After many failed bills introduced to Congress and after a fierce debate regarding the constitutionality of federal securities regulation,⁹⁵ U.S. President Franklin D. Roosevelt made the commitment to enact federal legislation that would provide for national supervision of “traffic in investment securities in interstate commerce.”⁹⁶ The key goal would be to require issuers to provide full disclosure of information to the potential buyer, to have “full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.”⁹⁷ Indeed, “publicity is justly commended as a remedy for social and industrial diseases[,] [s]unlight is said to be the best of disinfectants; electric light the most efficient policeman[;] [t]he potent force of publicity must . . . be utilized in many ways as a continuous remedial measure.”⁹⁸ On May 27, 1933, the Securities Act became federal law.

The new law would help fill the gaps of blue sky legislation by implementing comprehensive provisions, including disclosure requirements and antifraud mechanisms. With regard to antifraud mechanisms, Congress recognized that allowing private parties to bring federal civil claims for wrongful conduct committed by securities issuers would enable the recovery of economic loss incurred,⁹⁹ as well as play an important role in assuring compliance and deterrence.¹⁰⁰ With

GEO. WASH. L. REV. 86, 94 (1959).

⁹³ *Id.*

⁹⁴ H.R. REP. NO. 85, pt. 2, at 2 (1933).

⁹⁵ See, e.g., Burgess, *The Twilight Zone Between the Police Power and the Commerce Clause*, 15 IOWA L. REV. 162, 162 (1930); Comment, *Constitutional Law—Power to Enact Federal Securities Act of 1933*, 32 MICH. L. REV. 811, 811 (1934).

⁹⁶ President Franklin D. Roosevelt’s Address to Congress (March 1933), reprinted in M. PARRINO, *TRUST IN SECURITIES: AN INTRODUCTORY GUIDE TO THE SECURITIES ACT OF 1933* 23 (1968).

⁹⁷ *Id.* at 24.

⁹⁸ See L. BRANDEIS, *OTHER PEOPLE’S MONEY* (R. Abrams ed. 1967), in which Brandeis expressed President Roosevelt’s regulatory philosophy.

⁹⁹ S. REP. NO. 73-792, (1934).

¹⁰⁰ H. BLOOMENTHAL, *SECURITIES LAW IN PERSPECTIVE: A CONCISE AND COMPREHENSIVE OVERVIEW OF AMERICAN SECURITIES LAW* 64 (1977).

regard to the newly required disclosure provisions, much debate came from the fact that the Securities Act did not provide more protection by going further and taking increased corrective action.¹⁰¹

The drafters of the Securities Act were primarily concerned with providing “adequate information to potential purchasers and holding those filing the registration statement liable for any misstatements or omissions.”¹⁰² They were also well aware that common law forms of recovery for deceit or fraud were severely limited and presented obstacles.¹⁰³ At common law, there was great variation in the definition of the scienter requirement, “particularly in admitting negligence as a sufficient substitute,” increased confusion and became misleading.¹⁰⁴ Also, there were jurisdictional impediments in obtaining jurisdiction of the perpetrators and varying common law elements in fraud, further making the case for providing a uniform source of protection for persons defrauded in the capital market.¹⁰⁵

The Securities Exchange Act of 1934 was enacted to aid in the shortcoming of the Securities Act of 1933 and to enact an independent administrative agency that would oversee and enforce federal securities laws, including promulgating rules pursuant to the Securities Act and the Exchange Act.¹⁰⁶ Enactment of the Exchange Act was particularly intended to curb abuses in speculation and market manipulation.¹⁰⁷ In fact, Congress was concerned about the use of manipulative devices, manipulative pricing, and the regulation of broker and dealer activities.¹⁰⁸

However, Congress also wanted to make sure that issuers of stock provided continuing information to investors, notwithstanding the disclosure requirements of the Securities Act. Recognizing the dangers of having unlisted securities float in national, regional, and over-

¹⁰¹ Martin Nussbaum, *Wall Street: From the Robber Barons to Regulation by the SEC in 95 Years*, 191 N.Y.L.J. 48, 48 (Jan. 30, 1984).

¹⁰² Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 Nw. U.L. REV. 627, 649 (1963).

¹⁰³ Harry Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227, 235 (1933).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 238-39.

¹⁰⁶ See *supra* note 71; see Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2014) (noting SEC Rule 10b-5 provides a cause of action, whether by the Securities and Exchange Commission or by private parties, making it unlawful for any person: to use any device or scheme to defraud; to make any untrue statement of material fact or to omit any statement of a material fact; or to engage in any act that is fraud or deceit upon any person in connection with the purchase or sale of any security).

¹⁰⁷ John E. Tracy & Alfred Brunson MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1027 (1934).

¹⁰⁸ Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j, 78k (2012).

the-counter exchange markets with high amounts of capital at stake, the Exchange Act's disclosure requirements made it a necessity for qualified securities to be registered and make continuous information disclosures.¹⁰⁹

Congress was also concerned with the dangers of insider trading on the part of corporate officers and directors who would use inside and confidential information to put themselves at a market advantage, thus abusing and betraying fiduciary duties of care and loyalty.¹¹⁰ Congressman Lea correctly noted: "We have had the ugly picture of corporation officials juggling with the stocks of their own companies, preying on their own stockholders through inside information they obtained as trustees of the trust they violated."¹¹¹

The importance of federal protection in the capital marketplace is evident; as one commentator puts it: "an increase in the quantity, and an improvement in the quality of information available to investors will facilitate intelligent investment decisions and improve the efficiency of securities markets in pricing securities and in allocating financial capital to real capital."¹¹²

B. PROTECTION IN THE EMPLOYMENT AND LABOR MARKET

No general applicable federal statute exists in the workplace against fraudulent misrepresentations committed by employers. And, mandatory disclosure has been an unexplored concept in the employment and labor field, garnering little attention from scholars or as a matter of public policy.¹¹³ Yet, like capital investors, employees in the workplace need two essential things: information and accuracy in the information given. Without it, employees, like investors, are unable to make intelligible decisions with respect to their livelihoods; namely, whether it is in their best interests to stay in the company or find employment elsewhere. More importantly, employees are likely to be impacted more in the future than capital investors, as employees must take into their pension, benefits, promotion opportunities, employment agreements, grievance procedures, salary, and others.

¹⁰⁹ TRACY & MACCHESNEY, *supra* note 107, at 1025, 1049-1050.

¹¹⁰ STOCK EXCHANGE PRACTICES: REPORT OF SENATE COMM. ON BANKING AND CURRENCY, S. REP. NO. 73-1455, at 55 (1934).

¹¹¹ 78 Cong. Rec. 7861, 7862 (1934) (remarks of Congressman Lea).

¹¹² Greenfield, *supra* note 53, at 730. See also Victor Brudney, *A Note on Materiality and Soft Information Under the Federal Securities Laws*, 75 VA. L. REV. 723, 735-36 (1989).

¹¹³ Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 626 (1999); Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 655-61 (1993).

There are laws that protect employees. For instance, the Worker Adjustment and Retraining Notification (WARN) Act requires employers with 100 or more full-time employees to provide notification of plant closings and mass layoffs involving 50 or more workers at a single worksite.¹¹⁴ Notice of 60 days in advance must be given to workers, unions, and affected state agencies and authorizes the U.S. Department of Labor to promulgate regulations clarifying its applicability.¹¹⁵ What this federal statute does not do, however, is provide employees with protection for reliance on misrepresentations made by employers, nor does it provide employees with other forms of pertinent information, including information regarding management discussions or financial status and company health, which may be vital when only 60 days notice is given.¹¹⁶

Employees can also take advantage of information pertaining to health and benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA).¹¹⁷ Employers, mainly labor unions, are required to file, *inter alia*, financial information under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).¹¹⁸ The Occupational Safety and Health Act of 1970 (OSHA)¹¹⁹ requires employers to disclose to its employees hazards and workplace risks to which they are exposed.

To the extent employers engage in plant closings in a unionized context, the National Labor Relations Act (NLRA) requires employers to

¹¹⁴ MARION G. CRAIN, *WORK LAW: CASES AND MATERIALS* 287 (2d ed. 2010). *See also* Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (2012).

¹¹⁵ MARION G. CRAIN, *WORK LAW: CASES AND MATERIALS* 287 (2d ed. 2010). *See also* 29 U.S.C. §§ 2101-2109.

¹¹⁶ For instance, when disclosing pursuant to section 14(a) of the Exchange Act, 10-K annual disclosures that must be made must also include Management Discussion and Analysis of Financial Condition and Results of Operations (MD&A). Information disclosed pertains to a company's financial condition, changes in financial condition, and results of operations relating to liquidity and capital resources. Congress realized that investors were less interested in past events and more interested in future predictions; hence, by requiring such disclosures, it now gave investors the opportunity to look at a company through the eyes of management by providing short and long-term analysis of the business of the company. *See Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/rules/other/33-8056.htm> (last visited Mar. 20, 2014).

¹¹⁷ Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2012).

¹¹⁸ Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (2012).

¹¹⁹ Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2012). Under OSHA, employers must disclose or provide access to its employees Material Safety Data Sheets, which contain important information about health hazards associated with chemicals in the workplace. *See id.* OSHA federal regulations also include the Records Access Rule, 29 C.F.R. § 1910.1020 (2013), which requires employers to provide their employees with access to records containing historical medical and exposure reports of other employees who have been previously exposed to harmful chemical agents.

engage in effects bargaining with its employees whereby the employer must discuss and disclose to its employees the effects of the business closing.¹²⁰ A business closing, including for example, cancelling a business contract or relocating to another jurisdiction, based on cost factors other than labor, including management decisions is lawful and therefore not considered an unfair labor practice, so long as the employer engages in *effects bargaining* with the union.¹²¹ It is important to note that an employer has such an obligation only after it has implemented its decision to close shop, not before. Thus, although employees will receive information regarding the implications of the employer's management decision, it comes at a time least convenient to employees.

Alternatively, a business that makes the ultimate decision to shut down either entirely or partially by, e.g., subcontracting some of its work and based on factors including labor cost may also be lawful so long as the employer engages in *decisions bargaining* with the union representing the employees.¹²² Here, the employer must engage in bargaining discussions with the union before the employer has implemented any final decision. Decisions bargaining refers to the process by which an employer and union attempt to make a concession as to the plans the employer is to take, e.g. cutting labor costs and decreasing the labor force.¹²³ Hence, the quality and quantity of information that employees receive in the union context is dependent, to a great degree, upon the reasons for an employer's decision to close its business.

Also, in the union context an employer must make certain disclosures to a petitioning union. Called the Excelsior rule, an employer must produce to the union, without any initial union request, the names and addresses of employees in the unit within seven days of the approval of an election agreement.¹²⁴ The purpose of the requirement is to enable a union to distribute communications to the employees at their homes.¹²⁵ Although the Excelsior rule seeks to create increased information disclosure, unions face barriers to speaking to its employees, as employers often require unions to speak to its employees outside the workplace and outside working hours.¹²⁶ Unions also face

¹²⁰ National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

¹²¹ First Nat'l Maint. Corp. v. N.L.R.B., 452 U.S. 666, 666 (1981); see also National Labor Relations Act, 29 U.S.C. § 158(a)(5).

¹²² Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 203 (1964); see also National Labor Relations Act, 29 U.S.C. § 158(a)(5).

¹²³ Fibreboard Paper Products Corp., 379 U.S. at 203.

¹²⁴ Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239-40 (1966).

¹²⁵ *Id.*

¹²⁶ Matthew T. Bodie, *Information and the Market for Union Representation*, 94 Va. L. Rev. 1, 23 (2008).

barriers from employers in public places. In *Lechmere, Inc. v. NLRB*, the Supreme Court held that employers could prohibit “all nonemployee solicitation and distribution, including union solicitation, on its retail parking lot.”¹²⁷

As can be seen, employers already produce and report an abundance of information to the government that is of interest to employees and the general public. However, much of this information is submitted under an assurance of nondisclosure and is available to the public only in piecemeal form, or not at all.¹²⁸ Moreover, no available law provides for a general information disclosure requirement supplemented by a general remedy for disclosing inaccurate information.

IV. RECONCILING CONGRESSIONAL CONCERNS IN THE CAPITAL MARKET AND THE EMPLOYMENT AND LABOR MARKET

This section attempts to reconcile the concerns Congress had in enacting federal securities statutes, namely, the Securities Act and Exchange Act, with the absence of similar federal protections in the employment and labor market and makes the argument that because both markets share similar concerns, disclosure and fraud protection provisions are also justified in the workplace.

Like blue sky laws, which proved to be insufficient, in the employment and labor market states must also expend budget resources to thoroughly investigate and enforce existing disclosure and antifraud laws. However, for states that do not yet have such legislation, it would require adequate investment in state legislation. And states who ultimately determine the investment cost to be too high will forgo implementing the legislation altogether. As President Roosevelt noted, publicity is indeed a remedy for social and industrial diseases and it must be used as a “continuous remedial measure.”¹²⁹ Similarly, a federal mandate could aid in the recovery of economic losses incurred by employees and serve as a deterrent against employers in an all too common problem.

Just as Congress was concerned with the pitfalls and stringent requirements of common law notions of fraud, employees in the employment and labor market would be at an even greater disadvantage, as plaintiffs alleging common law fraud claims against their employers, particularly with respect to job security, present the most direct clash

¹²⁷ See *id.* See also *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 529, 541 (1992).

¹²⁸ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 396 (2011).

¹²⁹ See L. BRANDEIS, *OTHER PEOPLE'S MONEY* (R. Abrams ed. 1967).

with the employment at will doctrine, and thus are less likely to be successful.¹³⁰ Jurisdictional barriers also present problems for employees who want to make fraud claims against employers found out of state. Recognizing the high cost of litigation and that “all but middle and upper income employees are largely foreclosed from any access to a remedy for wrongful dismissal[s],”¹³¹ the complexity of jurisdictional requirements would curtail employee’s ability to summon employers to respond to allegations of fraud.

As the capital market must deal with the effects of insider trading, employees in the workplace are vulnerable to corporate representatives hiding information and using it to their advantage.¹³²

The workplace would greatly benefit from an improvement in the quantity and quality of information available to employees by enabling them to have access to information that is vital to making important investment decisions with respect to their livelihoods. Knowing where employees should invest their time and skills can help improve the overall efficiency of the employment and labor market, as talented workers will look for employers who offer generous benefits, practices, and policies, while incentivizing employers who are unable to attract good talent to do a better job in what they offer.

V. THE GENERAL IMPORTANCE OF FEDERAL INFORMATION DISCLOSURE AND FRAUD PROTECTION

Disclosure is about providing people with information to help them make better decisions.¹³³ Regardless of the market, disclosure is important because it can serve as a means to promote better compliance by making information regarding noncompliance more readily available and thus enforcement more likely.¹³⁴ Currently, much of the information that firms report publicly goes into government databases, which is frequently stored in a confidential manner, and firm-specific information is often unavailable to the general public even

¹³⁰ Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 240-49 (2005).

¹³¹ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 274 (2002) (citing Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 467-68 (1992)).

¹³² See, e.g., Local 1330, *United Steel Workers of Am.*, 631 F.2d at 1264 (arguing that corporate representatives arguably concealed information in order to retain the employees and keep them from leaving to other more prosperous employment opportunities).

¹³³ Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 338-39 (2013).

¹³⁴ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 373-74 (2011).

under the Freedom of Information Act (FOIA).¹³⁵ In the workplace, this is problematic because employers all too often rely on employees to comply with employer mandates and many U.S. employment laws are enforced primarily through private litigation.¹³⁶ Thus, because employees face adverse employment actions including discipline and termination for not abiding by employer mandates, disclosure could help prospective and current employees understand what is required of them.

Information disclosure can also lead to better-informed actors. Having information can facilitate self-learning or self-referential fact-finding.¹³⁷ For instance, a firm that does not know it is engaging in malicious or harmful behavior is less likely to take steps to remedy that behavior.¹³⁸ Information can clarify expectations between the sender and recipient of the information, which can reduce the possibility of an actor taking advantage of its recipient audience.¹³⁹

Disclosure regulation can empower corporate leaders to take charge and improve company performance by taking a more personal interest in assuring that the company is introducing more effective systems and processes.¹⁴⁰ For instance, by providing information about firm behavior to the public, including private watchdogs, it can alter not only the balance of power between corporations and the watchdogs but alter the dynamic of the negotiations as well.¹⁴¹ Information disclosure may influence sales or increase the possibility of increased government regulation, which may deter employers from committing unlawful practices, including engaging in misrepresentations.

Finally, persons who may be interested in learning about a firm's profile and internal processes such as job security and termination rates may find it difficult to obtain such information.¹⁴² Prospective employees will certainly not want to ask about it for fear they may be perceived as weak employees.¹⁴³

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ David J. Doorey, *A Model of Responsive Workplace Law*, 50 OSGOODE HALL L.J. 47, 67 (2012).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 74 (1990); see also Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 27 (1993) ("Young job entrants cannot easily assess an employer's reputation for how it handles senior workers").

¹⁴³ See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 74.

In the workplace, fraud tends to create an interstate effect,¹⁴⁴ where misrepresentations have induced employees to incur costs and move across state lines.¹⁴⁵ The U.S. Supreme Court has acknowledged that uniformity in labor agreements and collective bargaining is necessary because of the “possibility that individual contract terms might have different meanings under state and federal law” and such differences “would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.”¹⁴⁶

Fraud protection is particularly important in the employment and labor market because unlike financial capital, human capital is far less fluid.¹⁴⁷ “Investors are protected by the virtually infinite number of investment substitutes.”¹⁴⁸ If an investor is not satisfied with the performance or output of a particular investment in a company, she can look for another investment or simply sell it.¹⁴⁹ If a company has misled potential investors with regard to capital gains, those investors can generally find substitute investment vehicles in short order.¹⁵⁰ Thus, the investor will move on from a defrauding firm to a more truthful firm in a relatively quick manner.

There are fewer substitutes that exist in the employment and labor market.¹⁵¹ For instance, being unemployed is a less efficient substitute for a worker who loses his job than placing money in the bank is for an investor who must sell her stock in the company.¹⁵² Additionally, because of the difficulties of workers relocating, the exit option for workers is much costlier than it is for capital investors, where they can leave the capital market completely and at little cost.¹⁵³ Moreover,

¹⁴⁴ Greenfield, *supra* note 53, at 748.

¹⁴⁵ See, e.g., *Lazar v. Superior Ct.*, 909 P.2d 981, 639 (Cal. 1996). In this case, the state Supreme Court held that a former employee stated a cause of action for fraudulent inducement of employment contract when he alleged that his employer “intentionally represented to him he would be employed” as long as he performed his job, that he would receive significant increases in salary, and that the employer was strong financially. Alleging that “the representations were false, the employee relied on them when he left secure employment to accept a job in another state, severed his connections with that state’s employment market, moved his family, and purchased a home upon relocating.” *Id.*

¹⁴⁶ *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (quoting *Pennsylvania R.R. v. Public Serv. Comm’n*, 250 U.S. 566, 569 (1919)).

¹⁴⁷ Greenfield, *supra* note 53, at 749.

¹⁴⁸ Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1065 (1984).

¹⁴⁹ Greenfield, *supra* note 53, at 749.

¹⁵⁰ *Id.*

¹⁵¹ Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1066.

¹⁵² Greenfield, *supra* note 53, at 749.

¹⁵³ Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1066. The vivid comparison is to think of a steel plant worker from Youngstown attempting to move out of town to find work on the one hand, and a bag of money

the longer employees stay at a particular company, the higher their cost because of the more firm-specific skills they develop; thus they become more dependent on the firm's continued employment, as they will be more constrained.¹⁵⁴ To the extent fraud is concerned, long-term employees will be greatly impacted.¹⁵⁵

Fraud protection can help employees verify at the pre-hiring stage whether an employer's information is honest. Because at-will employment is the prevalent norm in the employment and labor market, employees have no redress for termination and cannot insure against it.¹⁵⁶ Accurate information about the "expected payoff" is imperative to determine whether and when to seek employment elsewhere.¹⁵⁷ Thus, concealing a firm's decline and making false representations of its profits impacts employees' ability to decide whether to quit, as fraud "credibly" conveys to employees that the firm is doing better than it actually is.¹⁵⁸

The implications of fraud applies equally to suppliers, vendors, and customers who make firm-specific investments or operate in markets where changing contractual partners is costly because most have open-term contracts with their firms; hence, they are particularly sensitive to specific information that makes termination more likely, such as declining firm profits and risk that the firm will engage in mass layoffs and decrease firm production.¹⁵⁹

Fraud also affects rivals in various ways. Within the capital market, federal securities laws require firms to make continuous disclosures with regard to profits, cost of sales, market share, and the like. This information is not only of use to capital investors but to competitors as well who use the disclosures to assess which business strategies are optimal and what the market wants in a given period.¹⁶⁰ Other firms' financial disclosures are "excellent source document[s]" that can help mitigate ambiguities about industry-level costs and demand, as well as help firms in the same industry make both effective and efficient long-term decisions.¹⁶¹ Overall, then, costs are reduced, which avoids

being moved across state lines.

¹⁵⁴ Greenfield, *supra* note 53, at 749-50.

¹⁵⁵ *Id.* at 750.

¹⁵⁶ Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1920 (2013).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1921.

¹⁵⁹ *Id.* at 1925.

¹⁶⁰ *Id.* at 1929.

¹⁶¹ Art Durnev & Claudine Mangen, *Corporate Investments: Learning from Restatements*, 47 J. ACCT. RES. 679, 680-81 (2009) (citing Phillip Moon & Ken Bates, *Core Analysis in Strategic Performance Appraisal*, 4 MGMT. ACCT. RES. 139, 140 (1993)).

the need for pricier alternatives such as industrial espionage, and reliability is increased, as the disclosures are certified pursuant to federal securities laws.¹⁶²

In the employment and labor market, rival firms would also benefit from accurate disclosures. For instance, a firm's anti-discrimination policies are designed to provide guidance to employees in the workplace by outlining procedures and processes to take when an employee has been the victim of prohibited conduct such as sexual harassment or retaliation. Often, however, employers fail to adopt comprehensive policies and are left investing in lawyers to defend employee lawsuits that could have been avoided. Having accurate information available from more model firms could aid struggling firms to improve their policies by incorporating the "source documents" into their own policy structure. If the disclosed information appears to reward a firm with fewer lawsuits, other rivals will use the information to their advantage. Alternatively, with the absence of fraud protection, reliance would decrease and rivals would think twice before using a firm's source documents, as the incentive for providing accurate information would dissipate.

Fraud is also costly to the government and communities. Fraud distorts government policy, reduces the tax base, creates unemployment, and harms communities.¹⁶³ As former Federal Communications Commission Chairman Michael K. Powell notes, the federal government often bases policy decisions on required disclosures "to set regulatory fees, determine interstate access charges for telecommunications, set rates for unbundled services, evaluate whether the division of federal-state jurisdiction is proper, and perform many other activities."¹⁶⁴

When fraud results in human capital loss because of failing firms or declining profits, "all levels of government suffer," particularly "from reduced tax revenues and increased demand for social spending."¹⁶⁵ The failure of a large firm affects the community, with increasing unemployment rates and business prospects, as people are forced to leave the affected region to look for better opportunities elsewhere. Illustrative is the Enron scandal. Enron declared bankruptcy, while other local companies in the area reported fraudulent activities, leaving Houston, an otherwise thriving and booming city, in a deeper and longer

¹⁶² Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1929-30 (2013).

¹⁶³ *Id.* at 1937.

¹⁶⁴ *Id.* (citing See J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REG. 207, 236 (2003)).

¹⁶⁵ Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1937-38 (2013).

recession than the National recession.¹⁶⁶ Houston's unemployment rate is generally lower than the national average.¹⁶⁷ From 1999 to 2006, crude oil prices tripled, so the city should have flourished; instead, however, the city's unemployment rate increased in 2002 and "remained between 0.5 and 1 percent above the national average until late 2006."¹⁶⁸

VI. THE INSUFFICIENCY OF THE STATUS QUO IN THE EMPLOYMENT AND LABOR MARKET

A. VOLUNTARY DISCLOSURE IS INADEQUATE

One of the major pitfalls and critiques of disclosure mandates is that too much information is already being poured over and thus requiring disclosure will only produce "wasteful and unnecessary" use of resources.¹⁶⁹ Therefore, it is better to rely on voluntary forms of disclosure to provide information to intended audiences.

One answer is that firms will keep a tight grip on a great amount of information about the terms and conditions of employment and if left to their own devices may likely hide information that is not to their advantage.¹⁷⁰ However, whether information is good or bad is irrelevant to an effective disclosure mandate, as recipients would benefit from both forms of information.

We can attempt to fill the information gap with alternative responses to a federal statute, such as the use of intermediaries and interviews and insider discussions. However, they do not cure the barriers of securing the kind of information that employees need: objective and standardized that includes not only the good information.¹⁷¹

Intermediaries. In theory, private intermediaries could help provide some objectively verifiable information. Examples of intermediaries include those that compile and gather information about firm practices for purposes of creating ratings and rankings.¹⁷² The National Association for Law Placement (NALP) is an example.

¹⁶⁶ *Id.* (citing GREATER HOUS. P'SHIP, THE ECONOMY AT A GLANCE: HOUSTON 1 (2011), available at <http://disnbr04.lonestar.edu/tomball/documents/NovemberEconomyataGlance.pdf> (examining Houston's recession)).

¹⁶⁷ GREATER HOUS. P'SHIP, THE ECONOMY AT A GLANCE: HOUSTON 1 (2011).

¹⁶⁸ See *Economic Development: Workforce*, GREATER HOUS. P'SHIP, <http://www.houston.org/business/> (last visited Mar. 20, 2014).

¹⁶⁹ Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199, 221-23 (2005).

¹⁷⁰ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 379 (2011).

¹⁷¹ *Id.* at 384.

¹⁷² *Id.*

Other intermediaries may include those that report information regarding company commitments and policies including demographic makeup and sexual orientation for organizations who seek to attain a reputation for diversity. For example, the Human Rights Campaign (HRC) rates companies for their policies regarding equal treatment of lesbian, gay, bisexual, and transgender employees.¹⁷³

All these examples are largely dependent on voluntary reporting by the firms themselves. The particular firms that choose to disclose certain information do so primarily for the purpose of demonstrating their positive performances and thus to help them be leaders in their respective industries. Firms who are not doing well or do not have adequate practices and policies will be less inclined to report, as they are unlikely to report disadvantageous information. Moreover, companies that voluntarily report are not really subject to any sanctions for providing inaccurate information.¹⁷⁴ For instance, many “Best Companies” ratings appear in intermediary publications that rely primarily on advertising revenues from the self-reporting companies themselves.¹⁷⁵

There are other intermediaries that rely on voluntary reporting using information disclosed from firm employees and applicants. Internet sites such as Vault.com¹⁷⁶ and Glassdoor.com¹⁷⁷ allow employees and applicants, mostly in an anonymous manner, to post information about their jobs, their employers, and the like. However, much of this information is unreliable because there is no accountability, the information is provided in an anonymous basis, and there is a fair amount of bias that is attached to the information, as the posts are based on individual experiences with a firm or prospective firm. Also, these types of intermediaries are limited to large organizations; there is scarce information available on either Vault.com or Glassdoor.com for smaller firms.¹⁷⁸

Interviews and insider discussions. If employees or prospective employees cannot get the information through intermediaries, perhaps they may get it by just asking their employer and avoid the need for mandated disclosure. However, workers care about the quality of their jobs, which in turn affects the type of questions likely to be asked to a

¹⁷³ *Id.* at 385. See also *Corporate Equality Index*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/corporate-equality-index> (last visited Mar. 28, 2014).

¹⁷⁴ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 385.

¹⁷⁵ *Id.*

¹⁷⁶ VAULT, <http://www.vault.com> (last visited Mar. 20, 2014).

¹⁷⁷ GLASSDOOR.COM, <http://www.glassdoor.com> (last visited Mar. 20, 2014).

¹⁷⁸ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 386.

firm.¹⁷⁹ Topics may involve issues about job security, fairness, training, and the like, and asking about such matters may get in the way of being favorably perceived.¹⁸⁰

Employees can try to obtain information once they are employed. They can speak to other employees and get “the scoop” of the current state of affairs in the workplace. Employees can ask management and employees who have been with the employer longer to provide relevant information. Nevertheless, insider discussions may prove to be inaccurate or lacking, especially by management who may be selective in the information provided. For instance, management will not disclose the firm’s current struggle with phase operations for fear of influencing employees to look for employment elsewhere. Even if a firm were to provide such information, employees may have a difficult time proving that it engaged in fraudulent misrepresentations.¹⁸¹

Lastly, fraud begets fraud.¹⁸² When a firm releases a misrepresented statement, its voluntary disclosures and observable actions must be consistent with the false statement, otherwise, the fraud will be discovered.¹⁸³

B. THE SHORTCOMINGS OF MARKET-SELF CORRECTION

Government fraud regulation may be unnecessary because the market may self-correct by providing its own forms of sanctions or incentives in the market. This theory is based on the insight that firms cannot lie about their services or products without incurring any costs.¹⁸⁴

However, employers of low performance may simply mimic the disclosure of certain ascertainable facts without being held accountable for any misrepresentations of untrue facts, thus frustrating the goal of verification and accuracy.¹⁸⁵ In turn, intended recipients would find it difficult to obtain accurate information, as they would have to verify the accuracy of a firm’s statements.¹⁸⁶

¹⁷⁹ *Id.* at 387.

¹⁸⁰ *Id.* See also Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1958-59 (1996).

¹⁸¹ Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 240-49 (2005). Plaintiffs in cases alleging fraud as to job security are less likely to be successful than those in other types of cases.

¹⁸² Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1924 (2013).

¹⁸³ *Id.*

¹⁸⁴ Greenfield, *supra* note 53, at 751.

¹⁸⁵ Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 674 (1984).

¹⁸⁶ David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1618-19 (1996).

In the employment and labor market, workers have less protection from private monitoring than in the capital market.¹⁸⁷ As one commentator put it: “the dominant minority of informed traders is the community of market professionals, such as arbitrageurs, researchers, brokers and portfolio managers, who devote their careers to acquiring information and honing evaluative skills.”¹⁸⁸ The capital market provides significant incentives for private monitoring of fraud while the employment and labor market must depend on the government for protection.¹⁸⁹ Thus, the government must incur an additional cost of supervision, as they must use additional resources and manpower to effectively monitor fraud.

Additionally, labor is much less fluid than capital, and arbitrageurs cannot make their fortunes by uncovering employer misrepresentations.¹⁹⁰ Unions could provide some sort of private monitoring, but with the increasing decline of unions,¹⁹¹ they are not nearly as enough to provide the kind of effective private monitoring that is needed in the workplace. Thus, without effective private monitoring devices, the workplace stands to benefit from a federal fraud protection.

Even if verification was possible, costs are not always absorbed by the party committing the fraudulent misrepresentations.¹⁹² An honest employer who wishes to show that its statements are truthful would have to add a warranty of verification, which could be costly.¹⁹³ In turn, hiring would be more costly, employers would decrease hiring, and employees would have a more difficult time finding employment.¹⁹⁴ Alternatively, where verification is not possible, employees will lose confidence in the market and demand higher wages in return for the increased risk.¹⁹⁵

Many employees have access to inside information, but much of the information tends to be incomplete or unverified.¹⁹⁶ And, the larger and more complex and diversified the firm, the less useful the

¹⁸⁷ Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 571 (1984).

¹⁸⁸ *Id.*

¹⁸⁹ Greenfield, *supra* note 53, at 781.

¹⁹⁰ *Id.*

¹⁹¹ See INTERNATIONAL LABOR OFFICE, WORLD LABOR REPORT 1993, at 34 tbl. 3.1 (1993) (showing union density in the United States at 15% in 1989 compared to 32% in Germany, 39% in the United Kingdom, 45% in Australia, and 81% in Sweden).

¹⁹² Greenfield, *supra* note 53, at 752.

¹⁹³ *Id.* at 753.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Urška Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1923 (2013).

information.¹⁹⁷ The reality is that most firms are large, complex, and diversified, and employees do not have the kind of access to internal information that would flag fraud.¹⁹⁸

C. STATE COMMON AND STATUTORY LAW IS INSUFFICIENT

A lie about a financial good in the capital market may give rise to securities fraud liability.¹⁹⁹ At common law, a lie in a nonfinancial setting may give rise to common law fraud (or deceit). Both types of fraud are similar in that they require similar elements; however, the element of reliance on the misrepresentation is different for common law fraud than it is for securities fraud. Reliance on a misrepresentation for liability in common law deceit must be actual and justifiable; by contrast, liability in securities fraud may arise under presumed reliance according to the fraud-on-the-market theory, provided the misrepresentation is material.²⁰⁰

In the common law arena, reliance is an essential element of causation connecting the misrepresentation to the plaintiff's injury because the misrepresentation influences the plaintiff only if "the plaintiff relies on the misrepresentation in acting or refraining from acti[ng]."²⁰¹ Reliance, however, is only one of the required elements of causation. Even if the plaintiff took an action that was injurious because she believed or relied on the defendant's statements, plaintiff's response may nevertheless be un-actionable.²⁰² This is because the plaintiff may not necessarily be justified in believing the statement if a reasonable plaintiff would know it was false, irrelevant, or insignificant.²⁰³ In this circumstance, plaintiff's actions and damages incurred would be her fault and the defendant will not be held liable for avoidable consequence injuries.²⁰⁴

In modern federal securities laws, reliance loses much of its importance because of the fraud-on-the-market presumption of reliance.²⁰⁵ The justification for this starts with the premise that capital investors have confidence in the integrity of the market price of securities and hence rely on the integrity of the market price: "an investor who buys or sells at the price set by the market does so in reliance on the

¹⁹⁷ *Id.* at 1923-24.

¹⁹⁸ *Id.* at 1924.

¹⁹⁹ See, e.g., Rule 10b-5, 17 C.F.R. § 240.10b-5 (2014).

²⁰⁰ Nicholas L. Georgakopoulos, *Frauds, Markets, and Fraud-on-the-Market: the Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud*, 49 U. MIAMI L. REV. 671, 673-74 (1995).

²⁰¹ *Id.* at 712.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 65, at 458 (5th ed. 1984).

²⁰⁵ Georgakopoulos, *supra* note 200, at 713.

integrity of that price” and “most publicly available information is reflected in market price[s];” therefore, “an investor’s reliance on any public material misrepresentations . . . may be presumed for the purposes of a Rule 10b-5 action.”²⁰⁶

The fraud-on-the-market presumption of reliance is largely unavailable at common law. Nevertheless, a presumption should be equally applicable in the employment and labor market. Just like investors have confidence in the integrity of the market price of securities, an employee places much confidence in the integrity of her employer, confidence in the terms and conditions of her employment, and confidence that her employer will not make misrepresentations.

The adoption of indirect reliance as an element under common law fraud is distinct because the causal connection and the injury to be remedied are different.²⁰⁷ Plaintiffs in a state cause of action for fraud seek to undo the consequences of their reliance by rescinding the transaction with the other party into which the misrepresentation led them.²⁰⁸ By contrast, plaintiffs in an action for securities fraud seek to recover the portion of the price they paid or did not receive due to the inflation or depression that the misrepresentation caused.²⁰⁹

Moreover, under common law fraud, parties whom the misrepresentation did not necessarily reach, either directly or indirectly, are unable to recover any overpayments they may have incurred due to the misrepresentation.²¹⁰ However, in federal securities laws, the fraud-on-the-market presumption of reliance permits recovery of overpayments made due to the misrepresentation even to those parties who ignore the misrepresentation.²¹¹

Although common law prohibits fraud and requires accurate disclosures, there is no general duty to disclose information. Only in those limited circumstances do courts require disclosure of known defects.²¹² Additionally, known disclosure mandates available in the

²⁰⁶ *Id.* at 714; *see also* Basic Inc. v. Levinson, 485 U.S. 224, 247 (1987).

²⁰⁷ Georgakopoulos, *supra* note 200, at 716.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See, e.g.*, Hill v. Jones, 725 P.2d 1115, 1119 (Ariz. Ct. App. 1986) (requiring the seller to disclose material facts about a home when such facts are not readily observable and not known to the buyer (citing Johnson v. Davis, 480 So. 625, 629 (Fla. 1985))). A court may require the seller to disclose “material facts about a home when such facts are not readily observable and not known to the buyer.” Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 48, n. 250 (2008).

employment and labor market are largely dependent on the type of sector and/or employer actions.²¹³

According to a study of reported case law in all U.S. jurisdictions, in the hiring stage, defendants tend to prevail in fraud actions brought by plaintiff employees in various contexts.²¹⁴ At least one commentator suggests that common law courts look with “antipathy” at fraud causes of actions brought by employees.²¹⁵ Moreover, obtaining proof for plaintiff employees in a claim for fraudulent misrepresentations is difficult, as the element of intent must be shown, which is further exacerbated due to the confusion of the “intent” requirement.²¹⁶

It can be said that disclosure laws are often adopted because of troublesome events, including highly publicized disasters that may have been prevented if an adequate law was in place.²¹⁷ In these cases, the public often demands that the government do something about it, often creating laws that are ill equipped to effectively deal with the issue at hand. This can lead to too many disclosures or not enough effective ones. However, the same can be said about regulation through the judicial process,²¹⁸ where judges also face pressures to act by highly publicized events but unrepresentative trouble stories.²¹⁹ Also, common law imposes a range of high costs because of the existing variation of legal rules across jurisdictions, coupled with the uncertainty and elasticity of the legal rules within each jurisdiction.²²⁰

With regard to statutory protection against fraud, few states actually offer any in the workplace.²²¹ When contrasted to other industries, states

²¹³ See *supra* notes 115-129.

²¹⁴ Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 236 (2005).

²¹⁵ Greenfield, *supra* note 53, at 722.

²¹⁶ Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: the Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 86 (“one must be aware that the ‘intent’ issue can arise in a variety of fraud settings, to wit: the intent not to perform an agreement at the time the representation was made, which is evidence of ‘promissory fraud’”); see *id.* (noting that the intent to induce reliance, that is, evidence that the defendant ‘intended’ that his or her representation induce the reliance on the part of the plaintiff; and intent as ‘scienter,’ that is, evidence of a knowingly, purposefully, fraudulent state of mind”).

²¹⁷ Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 377 (2013).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Greenfield, *supra* note 53, at 777. Notwithstanding the variance in legal rules to address fraud in the workplace, common law is inadequate to address the chief issue of disclosing information in the first place.

²²¹ Courts in Connecticut, Georgia, Massachusetts, Minnesota, and North Carolina have held that disputes arising out of the employer-employee relationship are not covered by those states’ unfair trade practices statutes. See DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 4.02[5][f] (1996) (collecting cases).

offer an array of statutory protection.²²² Also, states may be hesitant in adopting state regulation until they obtain assurances that other states will go along with the enactments,²²³ while other states may worry that adopting a statutory response will be costly due to employees moving to other states to take advantage of increased employee protection.²²⁴

Another concern is that statutory and common law protections can overlap “to such an extent that the system does not function well.”²²⁵ Professor Summers found that a system of employment and labor law with “too many cumulative rights and remedies” would make promises to employees, harass and drain the employer’s assets, while enriching the lawyers and clogging the judicial court system.²²⁶

D. A DEFICIENT INDIVIDUAL EMPLOYMENT RIGHTS LAW MODEL

In the United States, workers are vulnerable to unrestrained discretion of their employers with regard to employment decisions.²²⁷ Protection is little compared to other industrialized countries. With few exceptions, the at-will doctrine prevails and employees are terminable at will for any reason. In turn, employers have discretion to monitor employees’ computers, pay them low wages,²²⁸ and provide few benefits.²²⁹ If employees do not like the treatment, they have no choice but to bear it, find employment elsewhere, or sue with unlikely favorable results.²³⁰ Employees can seek collective rights protection; however, the National Labor Relations Act²³¹ and the collective rights and bargaining regime have been in steady decline, one commentator

²²² See, e.g., MASS. GEN. LAWS ANN. CH. 93A, § 2 (West 1997) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful”). See also *supra* notes 114-129.

²²³ Greenfield, *supra* note 53, at 784.

²²⁴ *Id.*

²²⁵ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 275 (2002).

²²⁶ *Id.* (citing Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 18 (1988) (“[t]he most difficult problem of the near future will be reconciling overlapping protections”).

²²⁷ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 261.

²²⁸ So long as it does not go below the federal minimum wage as established under the Fair Labor Standards Act, 29 U.S.C. §§ 206, 218 (2012), or under another applicable state or municipal minimum wage law.

²²⁹ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 261.

²³⁰ See *supra* note 131.

²³¹ Enacted in 1935 “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.” *National Labor Relations Act*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/resources/national-labor-relations-act> (last visited Mar. 29, 2014).

even stating that it is “the law of the past.”²³² Instead, it is individual employment laws that have been the growing model for workplace regulation.²³³

Nevertheless, today’s employment laws are inadequate to protect employees in the workplace. A great concern is whether workplace regulation dominated by individual employment rights provides an adequate forum in which employees can effectively vindicate their rights in either state or federal court.²³⁴ Indeed, commentators have stated that “[i]t would be hard . . . to find anyone who believes that the nation has enough judges and courthouses to make common law litigation the modal institution of employee grievance processing.”²³⁵ A parallel concern is “whether there are enough lawyers willing to take the cases.”²³⁶ The truth is that litigation costs are high and because of this reality, “all but middle and upper income employees are largely foreclosed from any access to a remedy for wrongful dismissal” and “[l]ower income employees without substantial tort claims will have difficulty finding a lawyer.”²³⁷ Employees could take advantage of alternative dispute resolution mechanisms but in the end, what employees need is an efficient and effective forum to adjudicate their employment rights.²³⁸

An employee who seeks redress against fraudulent misrepresentations made by her employer would have to navigate through the costly, risky, and lengthy court process, not knowing when she will be vindicated. And, unless they have the income, employees with insubstantial tort claims will be left out.

Another concern with the individual employment rights system is the “minimal terms” that employment and labor law provides. Many of the rights specified in current statutes are often not what employees

²³² William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 272 (2002).

²³³ *Id.* (citing James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1571 (1996) (“At some point during this legislative barrage, it became clear that Congress viewed government regulation founded on individual employment rights, rather than collective bargaining between private entities, as the primary mechanism for ordering employment relations and redistributing economic resources”)).

²³⁴ See *supra* note 131.

²³⁵ Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHL.-KENT L. REV. 149, 154 (1993).

²³⁶ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 274.

²³⁷ *Id.* (citing Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 467-68 (1992)).

²³⁸ William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKLEY J. EMP. & LAB. L. 259, 274-75 (2002).

need. "Employees often know better than Washington Bureaucrats how to improve their workplace;" indeed, the limitations of employment statutes are the result of their specification of minimum rights.²³⁹ For instance, under OSHA, employers must disclose or provide access to all its employees Material Safety Data Sheets, which contain important information about health hazards associated with chemicals in the workplace.²⁴⁰ While this is an important right for employees to assert, many employees may prefer to have available other more relevant information.

A final concern is that research indicates that an increasing number of employees in the United States are filing fraud actions to remedy employer misrepresentations.²⁴¹ "Fraud claims are particularly problematic for employee plaintiffs because of the disfavored nature of the fraud action and the difficult proof issues associated with the claim."²⁴²

VII. COSTS AND BENEFITS OF A FEDERAL STATUTORY RESPONSE IN THE EMPLOYMENT AND LABOR MARKET

Implementing a general disclosure mandate in the workplace will undoubtedly be costly, and because it involves enforcement and monitoring from a public body, it also includes costs on society as a whole.²⁴³ However, the relevant question is whether the costs would outweigh the benefits in the employment and labor market.

To the extent fraud is concerned, one objection that can be made to the requirement of a federal statute is that the concept of "materiality" will be extremely difficult to prove as it must be done on a case-by-case basis, and thus an employer will have to incur high costs to make sure that anything it communicates with its employees is not against the law.²⁴⁴ Furthermore, because employers engage in employee communications at all times of the working day, formally and informally, monitoring may be more difficult.²⁴⁵ However, what is considered "material" in the workplace would entail only a subset of

²³⁹ *Id.* at 276 (citing Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 493 (2001)).

²⁴⁰ *See supra* note 119.

²⁴¹ Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 237 (2005).

²⁴² *Id.* at 588.

²⁴³ Victor Brudney, *A Note on Materiality and Soft Information Under the Federal Securities Laws*, 75 VA. L. REV. 723, 733-34, nn. 31-34 (discussing the social costs of truth-telling).

²⁴⁴ Greenfield, *supra* note 53, at 777. In this context, "materiality" refers to the weight of a given misrepresentation. Thus, for a misrepresentation to be fraudulent, it must be "material."

²⁴⁵ *Id.*

all employee communication.²⁴⁶ If compared to other markets, the cost is much lower.²⁴⁷

A federal statute can provide many benefits in the employment and labor market. Forcing firms to compile information about their activities will incentivize “self-reflection” through firm fact-finding. In turn, management will educate itself on matters deemed important to the employer.²⁴⁸ Specifically, if employers fear that disclosing certain information will affect their image or reputation, this will serve as fuel to encourage management and corporate representatives to take a more vested interest in the affairs of their company.²⁴⁹ What results is a form of internal discipline, as management will be more critical of the information that is conveyed up and down the employer pipeline by ensuring that relevant information is collected and conveyed to responsible executives and corporate officials.²⁵⁰

Information disclosure regulation can have the effect of empowering private parties to act as monitors of employer conduct, an almost absent phenomenon in the employment and labor market. By so doing, whatever costs may initially be accrued by a government mandate will be offset by the engagement of private parties, including employees, consumers, and others who will use the information disclosed to pressure firms to adjust their behavior in a manner desired by the regulation or by the state.²⁵¹ Access to information about employer conduct may expose vulnerabilities and help in altering the unequal bargaining power that exists between employers and employees today.²⁵²

From a democratic perspective, information is “valuable to [a] vibrant democracy no matter what specific theory of democracy one endorses.”²⁵³ For instance, pluralist forms of democracy rely on majoritarian decisionmaking, which are constrained by individual rights. In such context, information is necessary to assist individuals

²⁴⁶ *Id.*

²⁴⁷ *Id.* In the capital market, there is a broad range of required disclosures that must be made to companies, potential investors, and the general public, which encompasses a much broader reach than would be necessary in the employment and labor market. *Id.*

²⁴⁸ David J. Doorey, *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J. 353, 374-75 (2005).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 375.

²⁵¹ *Id.*

²⁵² Cass R. Sunstein, *Informational Regulation and Informational Standing: Atkins and Beyond*, 147 U. PA. L. REV. 613, 618-19 (1999).

²⁵³ William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1802-03 (1999); see also CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1-3 (1976).

defend their fundamental rights against majority force.²⁵⁴ Information helps the public monitor the “apparatus” of the government and the private sector, which in turn allows citizens to form and value beliefs and choices, enabling deliberative and healthy debate.²⁵⁵

VIII. A PROPOSED OUTLINE

If the arguments above have been convincing, this section will provide an outline of what a federal statute might look like, with components of mandated disclosure and liability against fraud, taking into account factors of scope, cost effectiveness, administrative regulatory support, and liabilities, sanctions, and enforcement.

A. CONTOURS AND SCOPE OF DISCLOSURE AND FRAUD PROTECTION

Disclosure is about transparency, and transparency is about availability, accessibility, and accountability.²⁵⁶ These are the goals that a proper disclosure mandate should seek to achieve. Disclosure will facilitate knowledge, but its effectiveness to do so will depend on many factors, including the degree of disclosure.²⁵⁷

To construct an effective federal statute, three degrees of disclosure must be reflected upon. Firstly, Congress must determine who possesses the pertinent information or documents.²⁵⁸ In this case, firms possess the relevant information, which employees seek to obtain. Thus, the disclosing parties would include employers that employ a large enough number of employees.²⁵⁹ Secondly, Congress would need to determine which records, proceedings, or data would need to be disclosed by firms and which would not.²⁶⁰ Information could include management discussions and analysis of the financial condition and results of operation.²⁶¹ Information could relate to the company’s financial condition in an easy to read format, changes in financial condition, and results of operations relating to liquidity and capital

²⁵⁴ William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1802-03.

²⁵⁵ *Id.*

²⁵⁶ Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1346 (2011).

²⁵⁷ *Id.* at 1345.

²⁵⁸ *Id.*

²⁵⁹ This paper does not go into what is considered a large enough number of employees. For simplicity purposes, this paper will follow the same quota as that of the Worker Adjustment and Retraining Notification (WARN) Act, which applies to employers who have 100 or more full-time employees; *see generally*, Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101(a) (2012).

²⁶⁰ Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1345.

²⁶¹ Such disclosure is currently available under federal securities laws. *See supra* note 117.

resources.²⁶² Thirdly, the size and identity of the permitted audience who will ultimately have access to the information should be taken into account.²⁶³ In this federal proposal, the audience could include employees as well as prospective employees who need information about a prospective employer. It is important to note that allowing access to any party would not be feasible; thus, only persons who could actually benefit would have access.²⁶⁴

With regard to fraud protection, SEC Rule 10b-5 provides a model outline of what a regulation may look like in the employment and labor market. The rule lays out the following elements: it shall be unlawful for any employer engaged in interstate commerce, “[t]o employ any device, scheme, or artifice to defraud; “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made” not misleading; or “to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”²⁶⁵

B. COST REDUCTION AND ANTICIPATING UNINTENDED CONSEQUENCES

Costs should be modest if the disclosure regime focuses on information that employers are “already producing, either for purposes of compliance with existing legal regimes or for distribution to current employees.”²⁶⁶ This may include federal statutes pertaining to workplace injuries, involuntary dismissals, and health hazards in the workplace. However, much of this information is rarely made public.²⁶⁷ A good place to start could be to piggyback on the existing reporting requirements and to make those disclosures available to a wider population base, including employees and prospective employees. Employers would bear no additional cost of organizing this information in a standardize readable format; if there was a cost, it would be the cost to publicly disclose the information on the internet, which would be minor.²⁶⁸ It might even be possible for the government to bear some cost in making the public disclosures. Regulatory officials will already have done much of the work in defining the form and content of the

²⁶² See *supra* note 117.

²⁶³ Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1345.

²⁶⁴ *Id.* at 1345-46.

²⁶⁵ Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10B-5 (2014).

²⁶⁶ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 396 (2011).

²⁶⁷ See *supra* note 129.

²⁶⁸ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 396.

information that is useful for regulators; hence, some of the burden of the required disclosure mandate could be shifted to the government.²⁶⁹

Another way that employers can reduce costs could be to post online. Employers already generate information regarding terms and conditions of employment for their own purposes, including for distribution to employees.²⁷⁰ Under a public disclosure mandate, employers could be required to post relevant information on the internet where only the intended audience can access the information, and the employer can update the disclosures whenever there is new information to be distributed.²⁷¹ The actual administrative cost of posting existing company documents on existing company websites is likely to be small.

Targeted disclosures can help save employer resources in both the short-term and long-term future by focusing on providing only relevant information instead of simply “dumping” information to the prospective audience receivers. One of the most important regulatory developments has been the focus on targeted transparency.²⁷² More information is not necessarily the better alternative to no information.²⁷³ However, what is needed are disclosures that are more simplified and “targeted” that allow people to make the right decisions.²⁷⁴ One good example is Executive Order 13,563, a key executive directive of targeted transparency by the Obama Administration, which mandates a retrospective review of existing regulations and encourages a “provision of information to the public in a form that is clear and intelligible.”²⁷⁵ Thus, as Administrator of the Office of Information and Regulatory Affairs (OIRA) Cass Sunstein put it: “agencies should nonetheless take steps to eliminate undue complexity and should attempt, where appropriate and consistent with law, to simplify and ease people’s decisions.”²⁷⁶

To reach this form of disclosure, information technology and intermediaries can be used to standardize complex information into

²⁶⁹ *Id.* at 396-97.

²⁷⁰ *Id.* at 397.

²⁷¹ *Id.* at 397-98.

²⁷² Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 *YALE L.J.* 574, 578 (2012).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 579-80; *see also* Exec. Order No. 13,563, 76 *Fed. Reg.* 3,821, 3822 § 4 (January 21, 2011).

²⁷⁶ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: DISCLOSURE AND SIMPLIFICATION AS REGULATORY TOOLS 2 (June 18, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf.

“machine readable formats to enable consumers to make informed decisions.”²⁷⁷ For instance, the SEC promulgated a rule requiring applicable entities to provide standardized, machine-readable risk-return summary disclosures for mutual funds.²⁷⁸ Another instance are motor-vehicle letter grading for fuel economy and greenhouse gas emissions proposed by the Environmental Protection Agency and National Highway Traffic Safety Administration.²⁷⁹

C. ADMINISTRATIVE REGULATORY SUPPORT, LIABILITIES, AND ENFORCEMENT

Assuming that a federal mandate is enacted, Congress could take extra measures by providing congressional delegation of power to an executive administrative agency in order to carry out the enacted legislation. An executive branch agency would be tasked with promulgating rules pursuant to an informal or formal notice and comment process to encourage parties to participate in the rulemaking process and provide their wide expertise, as it can be predicted that there will be an array of participants across a wide spectrum of industries.

Enabling an executive agency to engage in rulemaking could aid in filling any gaps in federal law and create a more democratic process by allowing participants to engage in the rulemaking process. It would allow participants to input their expertise to improve federal regulation. Rulings and orders made through agency adjudicatory proceedings such as the NLRB is not mentioned because promulgating rules, unlike orders, applies in an across the board basis and are prospective in nature. Adjudicatory proceedings would potentially work against judicial expediency by having to go through an adjudicatory process and proceed on a case-by-case basis, expending resources on litigation.

The enforcement scheme should be crafted in a way to ensure that enforcement of the disclosure mandate does not overburden a disclosing entity.²⁸⁰ Firstly, with respect to compliance-related information,

²⁷⁷ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: INFORMING CONSUMERS THROUGH SMART DISCLOSURE 12 (June 18, 2010), *available at* <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf>.

²⁷⁸ Memorandum from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, for the Heads of Exec. Dep’ts & Agencies, Informing Consumers Through Smart Disclosure 2.

²⁷⁹ See Revisions and Additions to Motor Vehicle Fuel Economy Label, 75 Fed. Reg. 58,078, 58,082 (Sept. 23, 2010) (proposing letter grading); 76 Fed. Reg. 39,478, 39,488-89 (July 6, 2011) (to be codified at 40 C.F.R. pts. 85, 86 & 600, 49 C.F.R. pt. 575) (choosing alternative label); FUEL ECONOMY LABEL: EXPERT PANEL REPORT, U.S. ENVIRONMENTAL PROTECTION AGENCY (Aug. 2010), *available at* <http://www.epa.gov/fueleconomy/label/420r10908.pdf> (making design recommendations for letter-grade labels).

²⁸⁰ Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 400-01

penalties for failure to accurately disclose required information could be part of the federal statutory remedy in an enforcement action brought by a plaintiff employee (or prospective employee).²⁸¹ Secondly, with respect to agreements demanded by employers as a condition of employment and that bind employees (e.g. arbitration agreements), "advance public disclosure" could be a condition of the agreement's enforceability.²⁸² The cause of action should require, as any other law should, that the complaint for fraud be done with "certainty, clarity, specificity, particularity, and objectivity."²⁸³

IX. CONCLUSION

VIII outlines a recommended federal statute of disclosure and fraud protection by addressing its possible contours and scope, methods to reduce costs and anticipate unintended consequences, the possibility of an executive administrative agency to promulgate rules to aid in further interpreting the proposed federal statute, as well as possible liabilities and enforcement schemes that could be used. Part IX concludes with the proposition that a federal law is both possible and necessary.

This paper has argued that a disclosure mandate cannot exist without the availability of fraud protection because the former would be meaningless without the latter. Furthermore, the status quo in the employment and labor market is insufficient. For instance, common law is inadequate to deal with issues of disclosure and fraud, just as Congress so argued when it was concerned with its deficiencies in the capital market.

The importance of a disclosure mandate coupled with fraud protection in the employment and labor market cannot be overstated. When comparing the costs to its benefits, this paper concludes that a federal statutory response could work in the employment and labor market. Without a uniform disclosure requirement, much of this information will be difficult to obtain. Information that is voluntarily disclosed may not have the security of verifiability that is needed. Market-self correction is unable to effectively monitor and regulate the gaps in the workplace. And, the overlapping issues in the current individual employment rights law model would prove ineffective in providing the kind of protection that employees need in the workplace.

(2011).

²⁸¹ *Id.* at 401.

²⁸² *Id.*

²⁸³ See *Advent Elecs. Inc. v. Buckman*, 918 F. Supp. 260, 264-65 (N.D. Ill. 1996) ("[A] claimant must be able to point to specific, objective manifestations of fraudulent intent-a scheme or device. If he cannot, it is in effect presumed that he cannot prove facts at trial entitling him to relief").

Adopting a federal statute is no easy task. Indeed, many issues must be addressed. As some commentators have stated: for mandated disclosure and fraud protection to work, lawmakers must succeed not only at identifying the problem that needs a regulatory response, but they must also correctly decide that mandated disclosure coupled with fraud protection is the appropriate regulatory solution and they must comprehensively articulate the standard.²⁸⁴ In the end, however, employees must be given an opportunity to obtain necessary information that will enable them to make intelligent decisions about their current and future wellbeing, the same way that capital investors have the opportunity to do. And, employees must be given an opportunity to hold those liable for misrepresenting information, the same way that capital investors are able to do.

²⁸⁴ Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 378 (2013).